# Affin Bank Bhd v Dato' Mohamed bin Embong

HIGH COURT (KUALA TERENGGANU) — ORIGINATING SUMMONS NO 24–28 OF 2001
NIK HASHIM J
12 NOVEMBER 2001

***Land Law*** *— Restraint on dealings — Caveats — Removal of — Caveat on own land — Whether registered proprietor had caveatable interest — Registered proprietor must establish circumstances over and above that of his status as land owner — Pending suit and development project over land, whether clothed proprietor with caveatable interest in land*

The plaintiff, by a letter dated 23 October 1983, granted a loan of RM1,780,000 to MAE Sdn Bhd ('the borrower') which was secured by, inter alia, guarantees by the defendant and another individual, a charge dated 22 March 1984 over the land held under GM 4252, Lot No 4348, Mukim of Sura, District of Dungun, Terengganu ('the land') and a charge over another property, both charges of which were third party charges created by the defendant who was the registered proprietor of both properties. The borrower defaulted in its repayment of the loan and the plaintiff filed a suit at the Kuala Terengganu High Court Suit No 23–83–86 ('the suit') against the borrower, the defendant and another individual for the recovery of the same. The plaintiff subsequently filed an application to the land office for an order for sale of the land. On 19 September 2000, the land was sold to one Ruslam bin Ali @ Mansor ('the purchaser') for RM437,000 at an auction on the terms that the balance purchase price of 90% be paid within 90 days from 19 September 2000. No private caveat existed on the land at the time of the auction. The purchaser had requested and was granted an extension of time to settle the balance purchase price to 18 January 2001. On or about 26 December 2000, the defendant lodged a private caveat on the land and on 17 January 2001, the plaintiff was notified of the caveat. On 18 January 2001, the purchaser paid the balance purchase price to the land office. Due to the caveat, the land office was unable to issue a certificate of sale to the purchaser. The plaintiff by an originating summons under s 327 of the National Land Code 1965 ('the NLC') applied that, inter alia, the private caveat on the land to be removed; the defendant pay damages to the plaintiff for losses incurred as a result of the caveat; that the defendant indemnify the plaintiff for any claims made against the plaintiff by the purchaser and costs.

The defendant's counsel raised four preliminary objections to the plaintiff's application, namely: (a) that the originating summons was not the appropriate procedure for the plaintiff's application and therefore bad in law; (b) there was a stay order in respect of the suit and therefore further proceedings were illegal; and (c) the plaintiff was not an aggrieved party as the land was successfully sold. Learned counsel for the plaintiff contended that the defendant, being the registered proprietor of the land had no locus standi to caveat it under

s 323(1) of the NLC. Counsel for the defendant contended that the defendant had an interest in the land over and above his status as the proprietor. Issues considered by the court on the removal of the caveat were whether the defendant being the registered proprietor of the land had locus standi to caveat under s 323 of the NLC; whether the defendant had an interest in the land over and above his status as proprietor and whether the fact that the plaintiff's and borrower's suit against one another constituted a set of circumstances over and above that of the defendant's status as registered proprietor and whether the status of the defendant as proprietor of the land was being jeopardized by the sale of the land and that the land was the subject matter of the development project gave the defendant an interest in the land over and above his status as proprietor.

**Held**, dismissing the preliminary objections with costs and allowing the private caveat to be removed with costs:

(1) With regard to objection (a), unlike in the application, the land was not the subject matter of the suit. Therefore, the proper procedure for removal of a private caveat was not by way of a summons in chambers as contended by the defendant's counsel but by an originating summons. The counsel's contention could only be correct if the land was the subject matter of the suit, which was not in this case (see p 481E–F).

(2) Objection (b) was misconceived. The stay of proceeding pending appeal that was allowed was not in respect of the land but was in respect of the dismissal of the plaintiff's and the defendant's applications in their respective pleadings (see p 481G).

(3) Respecting objection (c), the plaintiff was genuinely aggrieved by the existence of the private caveat on the land because the plaintiff, as the chargee, could not obtain payment of the purchase price nor could it give good title to the purchaser of the land so long as the private caveat remained on the land (see p 481H–I).

(4) A registered proprietor of the land is not entitled to enter a private caveat in respect of his own land unless he is able to establish a set of circumstances over and above that of his status as a registered proprietor. The fact that the defendant's proprietorship in the land had been jeopardized because of the sale and that the land was the subject matter of development could not be considered as circumstances over and above his status as registered proprietor which gave rise to a distinct interest in the land entitling him to lodge the caveat (see pp 482I–483A, D).

(5) The pending suit did not clothe the defendant with a caveatable interest in the land. The counterclaim against the plaintiff for loss and damages as a result of the alleged premature recall and cancellation of the loan had no connection with the land although the same was a security for the loan, as the pending suit was between the plaintiff and the borrower, and whatever loss and

damages arising from the premature recall and cancellation of the loan due from the plaintiff was to the borrower and not the defendant (see p 483E–F).

(6) The defendant was a mere registered proprietor of the land and as such not entitled to caveat his own land. Therefore the caveat was to be removed with costs. No order was made with regard to reliefs (b) and (c) as they were inappropriate to be included in an application under s 327(1) of the NLC (see p 483C, G–H).

**[Bahasa Malaysia summary**

Plaintif, menerusi sepucuk surat bertarikh 23 Oktober 1983, telah meluluskan suatu pinjaman sebanyak RM1,780,000 kepada MAE Sdn Bhd ('peminjam') yang dicagarkan oleh, antara lain, jaminan defendan dan seorang individu yang lain, suatu cagaran bertarikh 22 Mac 1984 ke atas tanah yang dipegang di bawah GM 4252, Lot No 4348, Mukim Sura, Daerah Dungun, Terengganu ('tanah tersebut') dan cagaran ke atas suatu lagi hartanah, yang mana kedua-dua cagaran adalah cagaran pihak ketiga yang diwujudkan oleh defendan yang merupakan tuan punya berdaftar kedua-dua hartanah tersebut. Peminjam telah ingkar dalam bayaran balik pinjaman tersebut dan plaintif memfailkan Guaman No 23–83–86 ('guaman tersebut') di Mahkamah Tinggi Terengganu terhadap peminjam, defendan dan seorang lagi individu untuk mendapat kembali yang sama. Plaintif kemudiannya memfailkan permohonan kepada pejabat tanah untuk satu perintah jualan tanah tersebut. Pada 19 September 2000, tanah tersebut telah dijual kepada seorang bernama Ruslam bin Ali @ Mansor ('pembeli tersebut') untuk RM437,000 di perlelongan dengan syarat bahawa baki harga belian sebanyak 90% dijelaskan dalam tempoh 90 hari daripada 19 September 2000. Tiada kaveat persendirian wujud atas tanah tersebut semasa lelong diadakan. Pembeli telah meminta dan dibenarkan perlanjutan masa untuk menjelaskan baki harga belian sehingga 18 Januari 2001. Pada atau sekitar 26 Disember 2000, defendan memasukkan kaveat persendirian atas tanah tersebut dan pada 17 Januari 2001, plaintif diberitahu tentang kaveat tersebut. Pada 18 Januari 2001, pembeli telah membayar baki harga belian kepada pejabat tanah. Disebabkan kaveat tersebut, pejabat tanah tidak dapat mengeluarkan perakuan jualan kepada pembeli. Melalui saman pemula di bawah s 327 Kanun Tanah Negara 1965 ('KTN'), plaintif memohon agar, antara lain, kaveat persendirian atas tanah tersebut dibatalkan; defendan membayar gantirugi kepada plaintif untuk kerugian yang ditanggung akibat kaveat tersebut; defendan menanggung rugi plaintif untuk apa-apa tuntutan yang dibuat terhadap plaintif oleh pembeli dan kos. Peguam defendan menimbulkan empat bantahan permulaan terhadap permohonan plaintif, iaitu: (a) bahawa saman pemula bukanlah prosedur yang wajar untuk permohonan plaintif dan dengan itu tidak sempurna di sisi undang-undang; (b) wujudnya satu perintah

penggantungan berhubung dengan guaman tersebut dan dengan itu prosiding lanjut adalah menyalahi undang-undang; dan (c) plaintif bukanlah pihak terkilan kerana tanah tersebut telah pun dijual. Peguam arif plaintif berhujah bahawa defendan, sebagai tuanpunya berdaftar tanah tersebut tidak mempunyai locus standi untuk mengkaveatnya di bawah s 323(1) KTN. Peguam defendan berhujah bahawa anak guamnya mempunyai kepentingan dalam tanah tersebut melebihi kedudukannya sebagai tuanpunya. Isu-isu yang dipertimbangkan oleh mahkamah tentang pembatalan kaveat tersebut adalah sama ada defendan sebagai tuanpunya berdaftar tanah tersebut mempunyai locus standi untuk mengkaveatnya di bawah s 323 KTN; sama ada defendan mempunyai kepentingan dalam tanah tersebut melebihi kedudukannya sebagai tuanpunya dan sama ada hakikat bahawa guaman plaintif dan peminjam terhadap satu sama lain merupakan set keadaan yang melebihi kedudukan defendan sebagai tuanpunya berdaftar dan sama ada kedudukan defendan sebagai tuanpunya tanah tersebut terjejas oleh jualan tanah tersebut dan bahawa tanah tersebut menjadi perkara projek pembangunan memberikan defendan kepentingan dalam tanah tersebut yang melebihi kedudukannya sebagai tuanpunya.

**Diputuskan,** menolak bantahan permulaan dengan kos dan membenarkan kaveat persendirian dibatalkan dengan kos:

(1) Berhubung dengan bantahan (a), berlainan dengan permohonan, tanah tersebut bukanlah perkara guaman. Maka, prosedur yang betul untuk pembatalan suatu kaveat persendirian bukanlah melalui saman-dalam-kamar seperti yang dihujah oleh peguam defendan tetapi melalui saman pemula. Hujah peguam hanya betul sekiranya tanah tersebut merupakan perkara guaman, yang bukannya kes di sini (lihat ms 481E–F).

(2) Bantahan (b) telah disalahtafsirkan. Penggantungan prosiding sementara menunggu penyelesaian rayuan yang dibenarkan bukanlah berkaitan dengan tanah tersebut tetapi berkaitan dengan penolakan permohonan-permohonan plaintif dan defendan dalam pliding mereka masing-masing (lihat ms 481G).

(3) Mengenai bantahan (c) pula, plaintif benar-benar terkilan oleh kewujudan kaveat persendirian ke atas tanah tersebut kerana plaintif, pihak kepada mana tanah dicagarkan, tidak boleh memperolehi bayaran harga belian dan tidak juga boleh memberikan hakmilik sempurna kepada pembeli tanah tersebut selagi kaveat persendirian kekal atas tanah tersebut (lihat ms 481H–I).

(4) Seorang tuanpunya berdaftar tanah tidak berhak memasukkan kaveat persendirian berhubung dengan tanahnya sendiri melainkan beliau boleh menunjukkan keadaan yang melebihi kedudukannya sebagai tuanpunya berdaftar. Hakikat bahawa milikan defendan dalam tanah tersebut telah dijejaskan

disebabkan jualan dan bahawa tanah tersebut menjadi perkara pembangunan tidak boleh diambil kira sebagai keadaan yang melebihi kedudukannya sebagai tuanpunya berdaftar untuk menimbulkan kepentingan nyata dalam tanah tersebut bagi membenarkannya memasukkan kaveat tersebut (lihat ms 482I–483A, D).

(5) Guaman ini tidak memberi defendan kepentingan boleh dikaveat dalam tanah tersebut. Tuntutan balas plaintif untuk kerugian dan kerosakan akibat perintah pramasa untuk tarik balik dan pembatalan pinjaman yang dikatakan tersebut tidak mempunyai kaitan dengan tanah tersebut walaupun ia merupakan cagaran untuk pinjaman, kerana guaman ini adalah di antara plaintif dan peminjam, dan apa jua kerugian dan kerosakan yang timbul daripada perintah pramasa untuk tarik balik dan pembatalan pinjaman yang harus dibayar oleh plaintif adalah kepada peminjam dan bukan defendan (lihat ms 483E–F).

(6) Defendan cuma merupakan tuanpunya berdaftar tanah tersebut dan dengan itu tidak berhak mewujudkan kaveat ke atas tanah sendiri. Oleh itu, kaveat tersebut hendaklah dibatalkan dengan kos. Tiada perintah dibuat berkaitan dengan relief (b) dan (c) kerana mereka tidak sesuai termasuk dalam satu permohonan di bawah s 327(1) KTN (lihat ms 483C, G–H).]

**Notes**

For cases on removal of caveats, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3257–3280.

**Cases referred to**

*Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd* [1992] 2 MLJ 504 (refd)

*Eu Finance Bhd v Siland Sdn Bhd (M & J Frozen Food Sdn Bhd, Intervener* [1989] 1 MLJ 195 (refd)

*Mulraj v Murti Rajhunathji Maharaj* AIR 1967 SC 1386 (refd)

*Sharifah Mastura bte Tuanku Ibrahim v Wan Aziz Ibrahim* [1993] 3 MLJ 231 (refd)

*United Malayan Banking Corp Bhd v Development and Commercial Bank (Ltd) Bhd* [1983] 1 MLJ 165 (refd)

**Legislation referred to**

National Land Code 1965 ss 323(1), 327(1)

*WM Lee* (*FS Lai*) (*Shook Lin & Bok*) for the plaintiff.

*Mokhtar Ngah* (*Mohd Badrol Awang* and *Azrul Alias* with him) (*Mokhtar Ngah & Co*) for the defendant.

**Nik Hashim J**:

*Application*

The plaintiff, by an originating summons, applied under s 327 of the National Land Code 1965 ('the NLC') for the following remedies:

(a) that the private caveat lodged by the defendant against the land held under GM 4252, Lot No 4348, Mukim of Sura, District of Dungun, Terengganu ('the land') be removed forthwith;

(b) that the defendant pay damages to the plaintiff for the losses incurred by the plaintiff as a result of the entry of the said private caveat;

(c) that the defendant do indemnify the plaintiff against any claims that the purchaser of the land may make against the plaintiff;

(d) costs.

*Background*

The plaintiff, by a letter dated 23 October 1983, granted a loan of RM1,780,000 to one MAE Sdn Bhd ('the borrower'). The loan was guaranteed by the defendant herein and another individual. The loan was secured by, inter alia, a charge dated 22 March 1984 over the land, and a charge over another property, both of which were under third party charges created by the defendant herein who was the registered proprietor thereof.

The borrower defaulted in repayment of its loan and the plaintiff filed a suit at the Kuala Terengganu High Court under Suit No 23–83–86 ('the suit') against the borrower and the defendant and another individual for the recovery of the same. In their defence and counterclaim, they alleged that the plaintiff had prematurely recalled and cancelled the loan and thereby had caused unnecessary loss and damage to them. They prayed the loss and damage to be set off against the plaintiff's claim.

As the defendant failed to make any payments to the plaintiff as demanded in Form 16E, the plaintiff filed an application to the land office for an order for sale of the land.

Consequently, on 19 September 2000, the land was sold to one Ruslam bin Ali @ Mansor ('the purchaser') for RM437,000 at an auction, and it was a term of the conditions of sale that the balance purchase price of RM393,000 (after deducting the 10% deposit of RM43,700) be paid within 90 days from 19 September 2000. At the time of the auction, no private caveat existed on the land.

At the request of the purchaser, the land office had extended the time for the purchaser to settle the balance purchase price to 18 January 2001.

On or about 26 December 2000, the defendant lodged a private caveat on the land. On 17 January 2001, the plaintiff was notified of the caveat by the land office.

On 18 January 2001, the purchaser paid the balance purchase price of RM393,000 to the land office.

By reason of the private caveat lodged by the defendant, the land office is not able to issue a certificate of sale to the purchaser, and hence the plaintiff's application to remove the caveat.

After hearing the parties, on 5 September 2001, I dismissed the preliminary objections with costs and allowed the private caveat to be removed with costs. I now give my reasons.

*Preliminary objections*

At the start of the hearing, learned counsel for the defendant raised four preliminary objections to the application, namely:

(a) an originating summons is not the appropriate procedure for the plaintiff's application, and therefore is bad in law;

(b) the defendant contends that there is a stay order in respect of the suit, the subject matter of which is the land. Thus, the court must stay its hand as further proceedings are illegal, and counsel cited *Mulraj v Murti Rajhunathji Maharaj* AIR 1967 SC 1386 in support;

(c) the plaintiff is not an aggrieved party as the land was successfully sold to the purchaser;

(d) the plaintiff was not capable of being a chargee under the State of Terengganu Malay Reservations Enactment 1360 on 14 March 2001, when the originating summons was filed and thus had no locus standi to file the application.

With regard to objection (a), it is to be noted that unlike in the application, the land is not the subject matter of the suit. Therefore, the proper procedure for removal of a private caveat is not by way of a summons in chambers as contended by the defendant's counsel, but by an originating summons, as was clearly held in the case of *Tan Su Sing v Haluan Kreatif Sdn Bhd & Anor* [1998] 1 CLJ Supp 407 which was referred to by the learned counsel. The counsel's contention on this issue can only be correct if the land is the subject matter of the suit, which is not in this case. Thus, the originating summons is the proper procedure and therefore right in law.

Objection (b) is misconceived. The stay of proceeding pending appeal that was allowed was not in respect of the land but was in respect of the dismissal of the plaintiff's and the defendant's applications in their respective pleadings. It must be emphasized that the land is not the subject matter of the suit. Thus, the observations of the Supreme Court of India in the case of *Mulraj* that the court 'must stay its hand; if it does not do so, it acts illegally' does not apply.

Respecting objection (c), I agree with learned counsel for the plaintiff that the plaintiff is genuinely aggrieved by the existence of the private caveat on the land because the plaintiff, as the chargee, cannot obtain payment of the purchase price nor can it give good title to the purchaser of the land so long as the private caveat remains on the land (see *Kwong Yik Bank Bhd v Official Assignee (as Receiver of the Estate JAH)* [1992] 1 CLJ 63).

Regarding objection (d), learned counsel for the defendant withdrew the objection. However, it is to be noted for record that the Malay Reservations Enactment (Amendment of Second Schedule) Order 2001 which came into force on 14 March 2001, wherein the Malay Reservations Enactment 1360 has been amended by substituting 'Perwira Affin Bank Bhd' with the words 'Affin Bank Bhd'. Thus, it is clear that the plaintiff under which it is presently known, is at all times duly registered under the Enactment and therefore is a lawful chargee of the land, and thus has locus under the NLC to file this application.

By reasons of the matters aforesaid, I therefore found that the defendant's preliminary objections had no merits and as such, I dismissed them with costs. The court then proceeded to hear the application on its merits.

*Contentions of the parties*

It is the submission of learned counsel for the plaintiff that the defendant being the registered proprietor of the land has no locus standi to caveat it under s 323(1) of the NLC. The fact that there is a pending suit does not clothe the defendant with a caveatable interest. In any event, the pending suit is between the plaintiff and the borrower, and whatever loss and damages due from the plaintiff is to the borrower and not the defendant.

Learned counsel for the defendant, on the other hand, contends that the defendant has an interest in the land over and above his status as the proprietor. His proprietorship in the land has been jeopardized because of the sale, and further, the land is the subject matter of the development project.

*Findings of the court*

With respect, I find much merit in the plaintiff's counsel's submissions.

The plaintiff's application herein is filed under s 327(1) of the NLC which provides:

> Any person or body aggrieved by the existence of a private caveat may at any time apply to the court for an order for its removal, and the court (acting, if the circumstances so require, ex parte) may make such order on the application as it may think just.

The plaintiff, being a chargee and a body aggrieved by the existence of a private caveat, is therefore entitled to file the application for its removal under s 327 of the NLC (see *United Malayan Banking Corp Bhd v Development and Commercial Bank (Ltd) Bhd* [1983] 1 MLJ 165).

The private caveat lodged by the defendant over the land was purportedly made under s 323(1) of the NLC. However, it has been established by case law, which I respectfully agree, that a registered proprietor of land is not entitled to enter a private caveat in respect of his own land (see *Eu Finance Bhd v Siland Sdn Bhd (M & J Frozen Food Sdn Bhd, Intervener)* [1989] 1 MLJ 195; *Asia Commercial Finance (M) Bhd &*

A *Anor v Development & Realtor Sdn Bhd* [1992] 2 MLJ 504), unless he is able to establish a set of circumstances over and above that of his status as a registered proprietor (*Sharifah Mastura bte Tuanku Ibrahim v Wan Aziz Ibrahim* [1993] 3 MLJ 231).

Form 19B and the statutory declaration in support of the defendant's
B application to lodge a private caveat disclose that the ground for the defendant's application is that pending the determination of the parties' liability in the suit, the land ought not be transferred to any other party. Thus, this begs the question as to whether the fact that the plaintiffs and the borrower's suit against one another is still pending constitutes a set of circumstances over and above that of his status as a registered proprietor,
C thereby justifying the lodgement of the private caveat.

In my judgment, the defendant in the present case was a mere registered proprietor of the land and as such, he was not entitled to caveat his own land. The lodgement of the caveat was therefore wrongful. Neither was there any set of circumstances over and above his status as registered
D proprietor which affirmatively gave rise to a distinct interest in the land to entitle him as a registered proprietor to lodge a private caveat on the land. The fact that the defendant's proprietorship in the land had been jeopardized because of the sale and that the land was the subject matter of the development, in my view, cannot be considered as circumstances over and above his status as registered proprietor which gives rise to a distinct
E interest in the land entitling him to lodge the caveat.

The pending suit does not clothe the defendant with a caveatable interest in the land. The counterclaim against the plaintiff for loss and damages as a result of the alleged premature recall and cancellation of the loan has no connection with the land although the same was a security for
F the banking facilities provided to the plaintiff by way of a third charge as the pending suit, as rightly pointed out by the plaintiff's counsel, is between the plaintiff and the borrower, and whatever loss and damages arising from the premature recall and cancellation of the loan due from the plaintiff is to the borrower and not the defendant.

Thus, the private caveat lodged by the defendant was not one which
G had been properly and validly lodged in the first place and as such, I ruled they ought not be allowed to remain any longer. Hence, I ordered the caveat to be removed forthwith with costs.

However, I made no order in respect of reliefs (b) and (c) as I found that they were inappropriate to be included on an application under
H s 327(1) of the NLC which only provides powers for the removal of private caveats by the court. They ought to be tried separately.

*Preliminary objections dismissed with costs and private caveat allowed to be removed with costs.*

I Reported by Chew Phye Aun